

# American Law Schools in a Time of Transition

Ronald G. Ehrenberg

Being dean of an American law school these days is no easy task. To name a few of the challenges:

The economic model for law schools is breaking down because of the collapse of the job market for new lawyers, making it difficult to justify ever increasing tuition levels.

The American Bar Association is contemplating changing standards for law school accreditation. Concern has been expressed that the implicit requirement that most law school teaching be done by tenured and tenure-track faculty will be eliminated—a change that could have profound implications for the academic freedom of faculty members and their engagement in important public policy debates.

Finally, law schools are under pressure to diversify their student bodies and faculties with racial/ethnic and socioeconomic dimensions in mind.

But the challenges American law schools face are not unique. Because they are part of a much broader higher education system, there are lessons from that broader academic experience that may prove useful to them.

## What's Been Happening in American Higher Education?

During the last three decades, undergraduate tuition levels increased each year, on average, by 3.5 percent more than the rate of inflation at private four-year academic institutions. The comparable increases for public four-year and public two-year institutions were 5.1 percent and 3.5 percent, respectively.<sup>1</sup> Tuition increases in private higher education have been associated over this period with increased real expenditures per student. In public higher

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1. Sandy Baum & Jennifer Ma, College Board, Trends in College Pricing fig. 4 (2011), *available at* [http://trends.collegeboard.org/downloads/College\\_Pricing\\_2011.pdf](http://trends.collegeboard.org/downloads/College_Pricing_2011.pdf).

education, as I detail below, tuition increases often only have helped to compensate for reductions in state support.<sup>2</sup>

I have discussed extensively elsewhere the forces that cause private and public undergraduate tuition levels to continually increase at rates that exceed the rate of inflation, as measured by the rate of increase in the Consumer Price Index.<sup>3</sup> For private institutions, they include:

- The aspirations of academic institutions, similar to other nonprofit institutions, to be the very best they can be in every measure of their activities, calling for ever increasing resources.
- The perception by students and parents that where they go to college is almost as important as whether they go, and the belief that higher priced selective private institutions confer unique educational and economic advantages on their students. This leads to large applicant pools and only limited market pressures to slow tuition increases and it provides a cover for less selective institutions to raise tuition.<sup>4</sup>
- Published rankings, such as those of *U.S. News & World Report*, which are based partly on institutional expenditures per student, and thus lead to an arms race of spending.
- The growth of technology which often comes at a high cost and leads to improvements in the quality of higher education. But these quality changes are not reflected in the rate of increase in tuition because—unlike

2. Donna M. Desrochers, Colleen M. Lenihan & Jane V. Wellman, Delta Coast Project, Trends in College Spending 1998-2008 5 (2010), *available at* <http://www.deltacostproject.org/resources/pdf/Trends-in-College-Spending-98-08.pdf>.
3. *See, for example*, Ronald G. Ehrenberg, Tuition Rising: Why College Costs So Much (Harvard Univ. Press 2002) [hereinafter Ehrenberg, Tuition Rising]; Ronald G. Ehrenberg, The Perfect Storm and the Privatization of Public Higher Education (Cornell Univ. Press 2005); Ronald G. Ehrenberg, What's Happening to Public Higher Education? The Shifting Financial Burden (Johns Hopkins Univ. Press 2007); Ronald G. Ehrenberg, The Economics of Tuition and Fees in American Higher Education (Cornell Univ. Press 2007); B. Archibald & David H. Feldman, Why Does College Cost So Much? (Oxford Univ. Press 2010).
4. Most studies, find that high priced selective private institutions confer educational and economic advantages on their students. Dominic J. Brewer, Eric R. Eide & Ronald G. Ehrenberg, Does it Pay to Attend an Elite Private College? Cross-Cohort Evidence of the Effects of College Type on Earnings, 34 J. Hum. Resources 104 (1998) [hereinafter Brewer et al., Cross-Cohort Evidence], *available at* <http://www.terry.uga.edu/~mustard/courses/e8420/Ehrenberg-JHR.pdf>; and Eric R. Eide, Dominic J. Brewer & Ronald G. Ehrenberg, Does it Pay to Attend an Elite Private College? Evidence of the Effects of Undergraduate College Quality on Graduate School Attendance, 17 Econ. Educ. Rev. 371, 371-76 (1998), *available at* <http://nersp.osg.ufl.edu/~lombardi/edudocs/eide.pdf>. The only studies that find contrary evidence are Stacy Berg Dale & Alan B. Krueger, Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables, 117 Q. J. Econ. 1491 (2002) [hereinafter Dale & Krueger, Estimating the Payoff], *available at* [http://web.missouri.edu/~podgurskym/Econ\\_4345/syl\\_articles/berg\\_krueger\\_selective\\_college.pdf](http://web.missouri.edu/~podgurskym/Econ_4345/syl_articles/berg_krueger_selective_college.pdf); and Stacy Dale & Alan B. Krueger, Estimating the Returns to College Selectivity over the Career Using Administrative Earnings Data, National Bureau of Economic Research Working Paper No. 17159 (2011), *available at* [http://inpathways.net/return\\_on\\_selectivity.pdf](http://inpathways.net/return_on_selectivity.pdf).

with the Consumer Price Index—adjustments are not made for quality when rates of tuition increases are figured.

All of these factors apply to public higher education institutions as well, plus the pressure that cutbacks in state support put on tuition.

The nature of faculty positions has also changed dramatically during the last 30 to 40 years. The percentage of faculty nationwide that is full-time has declined from almost 80 percent in 1970 to 51.3 percent in 2007 and the vast majority of part-time faculty members do not have Ph.D.s.<sup>5</sup> The percentage of full-time faculty not on tenure track has doubled between 1975 and 2007, increasing from 18.6 percent to 37.2 percent.<sup>6</sup> As a result, today only about one-third of the faculty teaching at American colleges and universities are full-time and tenured or on tenure-track appointments.

Why did this change in faculty composition happen during a period when undergraduate tuition levels increased in real terms, on average? Part of the reason is that the tuition discount rate—the share of each tuition dollar that institutions return to undergraduates in the form of need-based or merit grant aid—increased substantially at private four-year institutions. For example, the average tuition discount rate for full-time first-year students at private four-year institutions reached 42 percent in the fall of 2008. The comparable figure in the fall of 1990 was 26.7 percent.<sup>7</sup> Much of the increase in tuition revenues at private colleges and universities has been plowed back into undergraduate aid. At all but a handful of the wealthiest private schools, the vast majority of undergraduate financial aid dollars come largely from tuition revenue.

The wealthiest and most selective private colleges, which have no problems achieving their desired enrollment levels, dramatically increased the generosity of their financial aid policies during the period in response to evidence that relatively small fractions of their students were coming from lower- and lower middle-income families.<sup>8</sup> These institutions also were influenced by rapid growth rates in their endowments during much of the period and by their relatively low endowment spending rates (which led to pressure from the U.S. Senate Finance Committee for them to increase endowment spending on financial aid). Dramatic increases in the financial need of their applicants because of the decline in family incomes and assets after the financial collapse

5. Thomas D. Snyder & Sally A. Dillow, United States Department of Education, Digest of Education Statistics 2009 (2010), *available at* [http://nces.ed.gov/pubs2010/2010013\\_0.pdf](http://nces.ed.gov/pubs2010/2010013_0.pdf).
6. Amer. Assn. of Univ. Professors, Trends in Faculty Status, 1975-2007, *available at* <http://www.aaup.org/our-work/research>.
7. National Assn. of College and Univ. Business Officers, Newly Released NACUBO Tuition Discounting Study Survey Report Shows Rates Remain Stable (2009), *available at* [http://www.nacubo.org/Research/Research\\_News/Newly\\_Released\\_NACUBO\\_Tuition\\_Discounting\\_Survey\\_Report\\_Shows\\_Rates\\_Remain\\_Stable.html](http://www.nacubo.org/Research/Research_News/Newly_Released_NACUBO_Tuition_Discounting_Survey_Report_Shows_Rates_Remain_Stable.html); National Assn. of College and Univ. Business Officers, 2009 NACUBO Tuition Discounting Study of Independent Institutions (2010).
8. Beckie Supiano & Andrea Fuller, Elite Colleges Fail to Gain More Students on Pell Grants, *Chron. Higher Educ.*, Mar. 27, 2011, at 57.

in 2008 also was a factor. Other private institutions, which use need-based and merit aid to craft their classes and to achieve desired enrollment levels, found that market forces do matter. Competition from lower-priced public institutions along with stagnating real family income levels during much of the period followed by declines in family incomes and assets after the financial collapse dramatically increased the need to raise grant aid and offer tuition discounts both to fill classes and to achieve the desired mix of students.<sup>9</sup>

In public higher education, tuition increases have barely offset a long decline in student state appropriations. In fiscal year 2010, state appropriations per full-time equivalent student at public higher educational institutions averaged \$6,454, a 19 percent decline from the peak year of fiscal 1987 when the comparable number was \$7,993.<sup>10</sup> Even before the impact of the Great Recession, real state appropriations per full-time equivalent student were still lower in fiscal year 2008 than they were 20 years earlier. Overall, the sum of net tuition revenue and state appropriations per full-time equivalent student at public institutions was roughly the same in real terms in fiscal 2010 as it was in fiscal 1987.<sup>11</sup>

In addition, academic institutions have changed how they allocate their resources. The share of institutional expenditures going to faculty salaries and benefits in both public and private institutions has fallen relative to that going to non-faculty uses such as student services, academic support and institutional support.<sup>12</sup> Some observers have attributed this to administrative bloat and the declining influence of the faculty on decision making at universities.<sup>13</sup> However, after experiencing the collapse of financial markets in 2008 and the Great Recession, many universities have hired external consultants to advise them on how to reduce administrative costs and are taking serious steps to do so. My own university, for example, is well on the way to reducing administrative costs on its Ithaca campus by between \$75 million and \$85 million a year. This represents 5 percent to 6 percent of its base annual operating budget, excluding external research funding. I must caution, however, that one-time reductions in administrative costs will not slow the rate of tuition increases. Continuous reductions in costs will be required to do that.

All of these things are occurring at a time when American higher education is facing enormous pressures. Our nation's economic growth and prosperity

9. While tuition levels rose in percentage terms by more at the four-year public institutions than they did at the four-year private schools during the period, because tuition levels were so much lower at the public schools at the start of the period, dollar increases in tuition were much larger at the private schools and the difference between public and private tuition levels (in real terms) increased during the period.

10. State Higher Education Executive Officers, State Higher Education Finance: FY 2010 (2011), fig. 3, available at [http://www.sheeo.org/finance/shef\\_fy10.pdf](http://www.sheeo.org/finance/shef_fy10.pdf).

11. *Id.*

12. Desrochers et al., *supra* note 2, at 18-19.

13. Benjamin Ginsberg, *The Fall of the Faculty; The Rise of the All-Administrative University and Why It Matters* (Oxford Univ. Press 2011).

during the 20th century was driven by the fact that we led the world in terms of the share of our population that had college degrees.<sup>14</sup> But other nations have overtaken us and today we rank no higher than 12 among 36 developed nations in the share of our young adult population with college degrees.<sup>15</sup> The groups in our population that are growing most rapidly—people of color, immigrants and people from relatively low income families—have historically been underrepresented in higher education. Improving access and college graduation rates is essential for our nation's prosperity in an increasingly competitive and a knowledge-based economy. Concerns that high rates of tuition growth will prevent us from achieving our goals, coupled with the decline in income and assets caused by the Great Recession, are putting pressure on private and public higher education institutions to limit tuition increases.

Public colleges and universities, where the vast majority of American undergraduate students are educated, face pressures to increase enrollments and graduation rates at the same time that state support is being cut. A growing private for-profit higher education sector which now enrolls almost 10 percent of all students has attracted primarily adult learners interested in education leading to careers. The largest players, including the University of Phoenix, have been among the leaders in restructuring education through the use of technology to improve learning and reduce costs. Notable efforts from the nonprofit sector to similarly do so include the work of the National Center for Academic Transformation<sup>16</sup> and the Open Learning Initiative at Carnegie Mellon University.<sup>17</sup>

The for-profits also have been among the leaders in reducing reliance on tenure and tenure-track faculty, seeking to measure learning outcomes and evaluating instructors based on what their students learn. Recent research concluded that very little learning actually occurs for many American students in higher education and this has added to the pressures for accountability that academic institutions now face.<sup>18</sup> Colleges and universities are increasingly being asked to provide information on how they assess learning outcomes as part of the accreditation process.

### **Possible Reduced Reliance on Tenure and Tenure-Track Faculty**

Proposed accreditation guidelines from the Standards Revision Committee of the American Bar Association would remove language that many faculty

14. Claudia Goldin & Lawrence F. Katz, *The Race Between Education and Technology* (Belknap Press 2008).

15. Tamar Lewin, *Once a Leader, U.S. Lags in College Degrees*, N.Y. Times, July 23, 2010, at A11.

16. See <http://www.thenatcat.org>.

17. See <http://oli.web.cmu.edu/openlearning/initiative>.

18. Richard Arum & Josipa Roska, *Academically Adrift: Limited Learning on American Campuses* (Univ. of Chicago Press 2011).

members—but not the ABA committee—have interpreted as requiring law schools to maintain a tenure system and to have most law school teaching conducted by full-time law school faculty.<sup>19</sup>

A traditional argument for the importance of a tenure system for faculty is based on academic freedom. Absent tenure and the job security it provides faculty members may be reluctant to pursue research on—or to engage in—public debate over controversial issues. Michael Olivas eloquently expressed this view in his presidential address to the American Association of Law Schools in 2011. And if one wanted to single out a single academic discipline in which such academic freedom is absolutely essential, it certainly would be law, where many faculty members debate and write about controversial public policy issues frequently.<sup>20</sup>

The importance of this rationale for tenure was brought home to me personally in the late 1970s when several trustees at my own institution challenged my promotion to professor because they disagreed with testimony I had given in a New York State regulatory proceeding.<sup>21</sup> President Frank Rhodes, who had arrived at Cornell only a few months earlier and who had never met me, suggested to the trustees that academic decisions were best left to academics and my promotion went through. The Cornell Trustees as a body shortly thereafter formally took the position, which it has repeatedly reaffirmed over the years, that academic decisions are best left to academics and that the final decisions on individual tenure and promotion cases are to be made by the provost and the president of Cornell, with the trustees giving only pro forma approval.

Economists have developed a number of other arguments that can be used to support the importance of tenure systems. Because a tenure system provides senior faculty with some job security, they have an incentive to fully share their expertise with junior colleagues and students without fear of creating competitors who will challenge their positions. In this way, tenure facilitates the intergenerational transmission and expansion of knowledge.<sup>22</sup>

The tenure system can also be thought of as an implicit long-term contract model or a winner-take-all tournament model; both of these models provide incentives for all faculty members to work harder than otherwise would be the case.<sup>23</sup> Labor economists would argue that tenure is a desirable job

19. Scott Jaschik, *Law School Tenure in Danger*, Inside Higher Ed, July 26, 2010, *available at* <http://www.insidehighered.com/news/2010/07/26/law>.

20. Michael Olivas, *Academic Freedom and Academic Duty*, AALS News, March 2011, *available at* <http://www.als.org/services-newsletter-presMarch11.php>.

21. The incident is described in Ehrenberg, *Tuition Rising*, *supra* note 3, at 127.

22. George J. Stigler, *The Intellectual and the Marketplace* 1-9 (Harvard Univ. Press 1984).

23. Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. Pol. Econ. 1261 (1979), *available at* [http://www.ocaw.ac.at/vid/download/fuernkranz/lazear\\_mandatory\\_retirement.pdf](http://www.ocaw.ac.at/vid/download/fuernkranz/lazear_mandatory_retirement.pdf); Edward P. Lazear & Sherwin Rosen, *Rank Order Tournaments as Optimal Labor Contracts*, 89 J. Pol. Econ. 841 (1981), *available at* <http://dipeco.economia.unimib.it/persona/Natale/>



characteristic and, in its absence, academic institutions would have to pay higher salaries to attract faculty of a given quality. Indeed, research that I and two collaborators have done suggests that, after controlling for other factors that influence salaries, economics departments that offer lower probabilities of tenure have to pay higher starting salaries to attract new faculty.<sup>24</sup>

While these arguments supporting a tenure system are important, one may reasonably ask this question: Why should the typical college student be taught by a researcher on the frontier of his field when the material the student is being taught may be miles inside the frontier? Doesn't heavy reliance on tenured and tenure-track faculty needlessly raise the cost of undergraduate education? Put simply, what is lost if undergraduate students are taught by adjuncts or full-time but not tenure-track faculty while a smaller number of tenure-track faculty focuses on research and graduate education?

Only recently have economists and other social scientists begun to address this issue and their findings suggest there is no such thing as a "free lunch" in higher education. For example, Liang Zhang and I studied institutional-level data for a number of years. After controlling for other factors, we found that, when a four-year academic institution increases its use of either full-time faculty not on tenure track or part-time instructors, its undergraduate students' first-year persistence rates and graduation rates decreased.<sup>25</sup> Several other studies have found that greater reliance on part-time faculty reduces both graduation rates for two-year students and the likelihood they will transfer to four-year colleges.<sup>26</sup> Still other studies have found that both public two- and four-year college students who take "adjunct heavy" first year class schedules are less likely to persist in college after the first year.<sup>27</sup>

Not all studies suggest that adjuncts always adversely influence academic outcomes. For example, Bettinger and Long,<sup>28</sup> in a study that may be

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economia\_del\_personale/Letture%5CLR81.pdf.

24. Ronald G. Ehrenberg, Paul J. Pieper & Rachel A. Willis, Do Economics Departments with Lower Tenure Probabilities Pay Higher Faculty Salaries?, 80 *Rev. Econ. & Stat.* 503, 503-12 (1998).
25. Ronald G. Ehrenberg & Liang Zhang, Do Tenured and Tenure-Track Faculty Matter?, 40 *J. Hum. Resources* 647 (2005).
26. Daniel Jacoby, Effects of Part-Time Faculty Employment on Community College Graduation Rates, 77 *J. Higher Educ.* 1081, 1081-1103 (2006); M. Kevin Eagan, Jr. & Audrey J. Jaeger, Effects of Exposure to Part-Time Faculty on Community College Transfer, 50 *Res. Higher Educ.* 168 (2009); Audrey J. Jaeger & M. Kevin Eagan, Jr., Unintended Consequences: Examining the Effect of Part-Time Faculty Members on Associate's Degree Completion, 36 *Community C. Rev.* 167 (2009).
27. Eric P. Bettinger & Bridget Terry Long, The Increased Use of Adjunct Instructors at Public Universities: Are We Hurting Students, in *What's Happening to Higher Education?* 51-70 (Ehrenberg ed., Greenwood Press 2007); Audrey J. Jaeger & M. Kevin Eagan, Jr., Examining Retention and Contingent Faculty Use in a State System of Public Higher Education, 25 *Educ. Pol'y* 507 (2011).
28. Eric P. Bettinger & Bridget Terry Long, Does Cheaper Mean Better: The Impact of Using Adjunct Instructors on Student Outcomes, 92 *Rev. of Econ. and Stat.* 598 (2010).

particularly relevant to legal education, showed that having an adjunct as an instructor in an introductory class in some professional fields increases the likelihood that a student will take additional classes in the field.

Given that many full-time, non-tenure faculty members are dedicated teachers and can devote themselves fully to undergraduate education because they do not have any research responsibilities, why might they adversely affect student outcomes as many of these studies suggest? Typically their teaching loads are higher than tenure-track faculty members, which may leave them with less time to work with individual students outside of class or to keep up with new developments in their fields. Adjunct faculty appointments are often ad hoc in nature and instructors trying to eke out a living from this type of work often must take on much heavier teaching loads, sometimes spread across multiple institutions in urban areas. This leaves them little time and often no place to meet students but in the classroom.<sup>29</sup> They also are less likely to be up to date on their department's curriculum and therefore may be less prepared to advise students.

However, what appears to be true for undergraduate education is not necessarily true for legal education. Adjuncts in law schools are typically practicing lawyers who bring professional knowledge to the classroom. Non-tenure track, full-time faculty in law schools are often found in clinical areas. Would adoption of an accreditation standard that deemphasized the importance of tenured and tenure-track faculty actually have any adverse effect on law students' education?

To answer such a question requires one to specify what the outcomes of legal education are and then to estimate whether the composition of faculty at a law school influences these outcomes. During the past year a group of undergraduate and graduate students and I took a first stab at doing this. We obtained the data to conduct our research from the *Official Guide to ABA Approved Law Schools*. The most recent year's data was available on the Law School Admission Council website, five previous years' data were obtained electronically from the ABA, and data for an additional eight years came from published volumes of the *Guide*.<sup>30</sup>

The law school performance measures available in the *Guide* were the attrition rate of first-year students for academic reasons and the bar passage rate for first-time test takers from the law school for the jurisdiction in which the largest numbers of its students took the bar exam. We adjusted the latter rate by comparing it to that state's average bar pass rate for first-time test takers.<sup>31</sup>

29. Liang Zhang & Xiangmin Liu, Faculty Employment at 4-Year Colleges and Universities, 29 Econ. Educ. Rev. 543 (2010) (showing that four-year academic institutions in urban areas make more use of part-time faculty than other four-year institutions).

30. I am grateful to Kenneth Williams at the ABA for providing us with the electronic data.

31. In computing this variable we first recalculated the state average pass rate removing the school's test takers and test passers from the data.



The *Guide's* faculty categorization was not ideal for our study.<sup>32</sup> These categories are: the shares of faculty who are “full-time,” “other full-time,” “deans and librarians and others who teach” and “part-time.” The full-time faculty measure included not only tenure and tenure-track faculty but also clinical and other faculty on multiyear appointments, as well as visitors temporarily filling “full-time” slots. The “other full-time” faculty measure included other people teaching full-time to whom no multi-year commitment had been made.

Nonetheless, we estimated whether either the academic attrition rate measure or our “adjusted” bar passage rate measures were associated with the shares of faculty at an institution from the different groups.<sup>33</sup> Our equations attempted to control for other factors that might be related to the outcomes, including student GPA and LSAT scores and, in some specifications, the gender/racial/ethnic distribution of students. We found no evidence from our analyses that the distribution of faculty across the types that were available to us had any effect on the first-year academic attrition rates or the adjusted bar passage rates of graduates of the institutions.

I must emphasize that the data we were using were inadequate to address the question of whether full-time tenured and tenure-track faculty matter. We did not have information on the share of faculty that were tenured or on tenure-track. Equally problematic, we had no information on the characteristics of faculty who were teaching first-year classes—the classes that would be most relevant in determining attrition after the first-year. We also had no information on the characteristics of faculty teaching basic second-year survey classes, which along with the first-year classes, cover the majority of the material that appears on bar exams. In theory, one could obtain information on the characteristics of the relevant faculty from copies of the annual *AALS Directory of Law Teachers*, but to do so in a cost efficient way would require the AALS to allow researchers access to electronic versions of the *Directory*.

I also make no claim that the student performance measures we used are the best available. The AALS might profitably address what better measures might be used. One might consider, for example, job market outcomes. Studies using job market outcomes would be akin to large numbers of studies by economists that seek to ascertain if labor market earnings of college graduates are related to the characteristics of the undergraduate institutions they attended.<sup>34</sup> As is commonly known, however, published data on the share of a law school's graduates who are employed and their salary levels have come under attack and better earnings data will need to be collected before one can focus on this outcome. What seems clear, however, is that before seriously

32. I am grateful to Richard Robinson, Associate Dean for Administration and Finance at the Cornell Law School for helping me to understand the classifications of faculty in the *Guide* and the years to which various data elements refer.

33. We used the faculty shares for the year the students were first-year students in the attrition equation and experimented with these shares and the average shares over the three years they were enrolled in law school in the bar passage equations.

34. Brewer et al., Cross-Cohort Evidence, *supra* note 4 at 104-23; Dale & Krueger, *supra* note 4.

proposing accreditation standards that decrease reliance on tenure and tenure-track faculty the ABA should want to know the answer to the question: “Do tenured and tenure-track faculty matter in law schools?”

### Diversifying Law School Faculty

American higher education institutions are trying to diversify their faculties across race, gender and ethnic lines. If talent is equally distributed across all groups, to do otherwise would not provide maximum faculty quality. While role models for students do not have to be of the same race, gender and ethnicity, some (but not all) research relating to undergraduate students suggests that female students are more likely to persist in science and engineering fields if the instructor in their introductory class is female. Analogous results were found in one study for African American students and African American professors.<sup>35</sup> A recent *New York Law Review* survey suggests that law schools with a high percentage of full-time female faculty members had a larger percentage of female students on their flagship law reviews.<sup>36</sup>

In a recent study, colleagues and I also addressed the role that the leaders of American colleges and universities—trustees, presidents and provosts—play in influencing the rate at which academic institutions diversify their faculties across gender lines.<sup>37</sup> While a much more direct role in faculty hiring is played by faculty search committees, department chairs and deans, presidents and provosts establish the “rules of the game” for faculty searches and make their expectations clear in terms of efforts to diversify. Trustees in turn make clear what their goals are for the institution during the process of hiring a president and monitor the institution’s and the president’s progress in meeting these goals. It is now quite common for trustees to require an annual report on faculty diversity efforts.

Using institutional level data spanning the 1984-2007 period in our study for a set of four-year colleges and universities, we estimated whether the

35. Examples include Kevin N. Rask & Elizabeth M. Bailey, Are Faculty Role Models? Evidence from Major Choice in an Undergraduate Institution, 33 *J. Econ. Educ.* 99 (2002); Scott E. Carrell, Marianne E. Page & James E. West, Sex and Science: How Professor Gender Perpetuates the Gender Gap, 125 *Q. J. Econ.* 101 (2010); Joshua Price, The Effect of Instructor Race and Gender on Student Persistence in STEM Fields, 29 *Econ. Educ. Rev.* 901, 901-910 (2010). Studies concluding that the gender match of faculty and students does not enhance female students’ persistence include Brandice J. Canes & Harvey S. Rosen, Following in Her Footsteps: Faculty Gender Composition and Women’s Choice of Majors, 48 *Indus. & Lab. Rel. Rev.* 484 (1995); Eric P. Bettinger & Bridget Terry Long, Do Faculty Serve as Role Models? The Impact of Instructor Gender on Female Students, 95 *American Economic Association Papers and Proceedings* 152, 152-157 (2005); Amanda L. Griffith, Persistence of Women and Minorities in STEM Field Majors: Is it the School that Matters?, 29 *Econ. Educ. Rev.* 911, 911-921 (2010).
36. Karen Sloan, Faculty Diversity Means Gains for Female Law Students According to Study, *Nat’l L. J.*, Nov. 2, 2011, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202523658844>.
37. Ehrenberg et al., Diversifying the Faculty Across Gender Lines: Do Trustees and Administrators Matter?, 31 *Economics of Education Review* 9-18 (February 2012).

gender of the president and the provost, as well as the share of trustees who were female influenced the rate at which the institution diversified its faculty across gender lines. We controlled for other variables that might be expected to influence this rate (for example, a measure of the expected share of new hires that should be female based upon the “female Ph.D. intensity” of the fields in which the institution employed faculty). We found that institutions with either female presidents or provosts, as well as those with a greater share of female trustees increased the female share of their faculties at a more rapid rate over the period. We also found that the magnitude of the effects of these leaders is larger at smaller institutions, where central administrators typically play a greater role in faculty hiring decisions, and that a critical mass of female trustees—at least 25 percent—had to be reached, before the gender composition of the board mattered.

Earlier studies by social scientists had also found evidence that the gender composition of deans and department chairs appeared to influence the rate at which new female faculty were hired.<sup>38</sup> My students and I knew from the *AALS Statistical Reports on Law Faculty* that in 1990-91 only 8.5 percent of law school deans were female and only 6.8 percent were people of color. By 2007-08, these percentages had risen respectively to 19.8 and 12.7. These changes led us to wonder if we could adapt the methodology used in our paper to estimate whether the gender of the dean at a law school influences the rate at which the school diversifies its faculty across gender lines and, similarly, if the race/ethnicity of the dean influences the rate at which the school diversifies its faculty across racial/ethnic lines.

Through online searches of *Directory of Law Teachers*, my students identified the gender and minority status of the dean of each ABA accredited law school each year from 1997-98 to 2010-2011. They then estimated equations using institutional level data in which the change in the share of the full-time faculty (obtained from issues of the *Official Guide*) that was female between two years was specified to be a function of the gender of the dean and of the initial year's share of female faculty. They conducted similar analyses for changes in the share of faculty that were minority using the minority status of the dean as the key explanatory variable. In none of the specifications that they estimated did they find any evidence that the gender of the dean significantly influenced the rate at which the gender distribution of the full-time faculty changed nor did they find any evidence that having a minority dean influenced the rate at which the share of the full-time faculty that was minority changed.

There are compelling reasons to try to diversify the leadership of law schools that go beyond changing the rate at which law schools diversify their

38. See, for example, Rebecca L. Bach & Carolyn C. Perruci, Organizational Influences on the Sex Composition of College and University Faculty: A Research Note, 57 Soc. Educ. 193 (1984); Stephen Kulis, Gender Segregation Among College and University Employees, 70 Soc. Educ. 151 (1997); Alison M. Konrad & Jeffrey Pfeffer, Understanding the Hiring of Women and Minorities in Educational Institutions, 64 Soc. Educ. 141 (1991); Anna Mari May, Elizabeth A. Moorhouse & Jennifer A. Bossard, Representation of Women Faculty at Public Research Universities; Do Unions Matter?, 63 Indus. & Lab. Rel. Rev. 699 (2010).

faculty so our evidence should not be interpreted as suggesting that efforts to diversify law school leadership should be reduced. Moreover, once again our research is not the definitive work on the topic. Changes in faculty shares results from hiring decisions, from decisions by faculty to move to other law schools, to accept nonacademic employment and to retire. Law schools also make decisions not to grant tenure to tenure-track faculty.

In addition, the gender and race/ethnic mixes of candidates for a law school faculty vacancy will depend on the specialty that school seeks to fill. For example, in 2007-08, 87.9 percent of antitrust law professors were male, but only 38.4 percent of family law professors were male. If the gender distributions of lawyers seeking faculty positions in antitrust and family law are similar to current faculty distributions, the likelihood that a vacant position will be filled by a female is much higher if the position is in family law than if it is in antitrust law.

These considerations suggest that if the AALS is interested in conducting a better designed study of the impact of the gender and minority status of law school deans on diversifying their faculties, it will need to provide researchers with access to individual-level data on new hires from the *Directory of Law Teachers*, along with data on the “availability” of job applicants by gender and minority status that might be obtained from both the *Directory* and the *Faculty Registry*. Future studies might also profitably take into account that the responsibilities of law school deans are varied and it is possible that the key individuals whose gender and race/ethnicity might matter are the associate or assistant deans in charge of academic affairs and faculty hiring, along with faculty search committee chairs.

### Ever Increasing Law School Tuition

The ABA Commission on the Impact of the Economic Crisis on the Profession and Legal Needs is well aware that law school tuition, like undergraduate tuition, has risen substantially relative to the rate of inflation.<sup>39</sup> What is not as well known is that law school tuition has also increased substantially relative to undergraduate tuition in the last two decades.

During the period between 1990 and 2009, average private law school tuition rose by 5.9 percent a year, while average private undergraduate tuition rose by half a percentage point less a year. Similarly while a weighted average of resident and nonresident public undergraduate tuition levels rose by about 6.8 percent a year during the period, average public resident and nonresident law school tuition levels rose by 9.1 and 7.5 percent a year, respectively.<sup>40</sup>

39. ABA Commission on the Impact of the Economic Crises on the Profession and Legal Needs, *The Value Proposition of Attending Law School* (2009), at 1, available at <http://www.americanbar.org>.

40. The law school tuition data are from the ABA and the undergraduate tuition figures from the College Board.

Why has this occurred? One possibility is that law school faculty salaries have increased more than faculty salaries in other academic disciplines and that higher tuition levels were necessary to attract and retain top law school faculty. I am not privy to data on salaries of faculty at private law schools but average salaries of faculty by discipline, including law, from a set of public universities and land grant colleges that are collected annually by the Office of Institutional Research and Management at Oklahoma State University are published periodically in *Academe*. English professors are a good comparison group because the Oklahoma State data indicate that salaries in many other fields have risen relative to those in English.

In 1991-92, the average salary of professors of law and legal studies was about 154 percent of the average salary of professors in English. By 2009-2010, the advantage of law professors had increased only slightly, to 159.5 percent. The comparable salary ratio advantages at the assistant professor level were 179.2 percent in 1991-92 and 171.6 percent in 2009-2010. Thus, during the period, salaries of assistant professors of law and legal studies actually fell a bit relative to those of assistant professors of English.<sup>41</sup> While these data are only for public institutions, they do not provide strong support for the proposition that more rapid increases in law school tuitions were attributable to the need to raise revenue for law school faculty salaries.

As I mentioned earlier, a large fraction of undergraduate tuition at private colleges and universities goes back to undergraduate students in the form of need-based or merit-based financial aid. Indeed the wealthiest private schools have eliminated all loans from the financial aid packages of undergraduate students. In contrast, the debt loads that law school graduates have been assuming are extraordinary. A cursory look at the data included in the most recent *U.S. News & World Report* academic rankings show that almost half of ABA-accredited law schools reported that 2010 graduates who incurred law school debt averaged more than \$100,000 in loans. The percentages of graduates with law school debt at these schools ranged from 61 to 99.

These numbers suggest that the typical private law school is probably not giving back as great a share of its tuition dollars in the form of grant aid as the typical private undergraduate institution. But I may be wrong. The *Official Guide* provides information on the share of recent students receiving grants or aid and the median amount of this aid for each law school. I checked the numbers for private law schools in New York State and found that between 36 percent and 75 percent of their students received aid, with the median grant level for full-time students ranging from \$7,500 to \$20,000. If private law schools have used higher tuition to provide increased aid to students, it would be prudent for them to share this information with potential applicants.

Cutbacks in state support for higher education at public universities have often been larger at professional schools, such as law, than for undergraduate education. From the perspective of state policy makers, larger cuts for

41. American Assn. of Univ. Professors, *Academe*, March/April 2011, at 14-15, available at <http://www.aaup.org>.

professional schools make sense because more highly educated individuals are more mobile and less likely to remain in the state and pay taxes after graduation than are college graduates.<sup>42</sup> Disproportionate cuts in state support for public law schools may partly explain their higher rates of tuition increases compared to public undergraduate students.

More likely, tuition increases at both public and private law schools have been driven by the same two forces that drive tuition increases in undergraduate education—the quest to accumulate resources so institutions can be the best they can be and the quest for prestige that is driven largely by published rankings of law schools, such as those of the *U.S. News & World Report*. A ranking scheme that is partly based on the resources devoted to educating students puts pressure on law schools to spend more. A ranking scheme that is partly based on student selectivity puts pressure on lower ranked law schools to try to “buy” top students with merit aid.<sup>43</sup> And a ranking system that is based partly on peer assessments and assessment scores by lawyers and judges puts pressure on law schools to be perceived as continually improving what they are doing and to spend money to convey such information to external constituents.

Put simply, national law schools find themselves in a competitive arms race of spending; any institution that unilaterally cuts spending or increases it at a slower rate than its competitors will fall behind in the rankings. The past promise of large earnings for law school graduates—much higher earnings than those of typical college graduates—made potential law students willing to pay rapidly increasing tuition. However, the collapse of the labor market for new lawyers has greatly dampened the likelihood that future potential law students will be willing to assume such large loan burdens, at least temporarily. It is reasonable to project that law schools will have to moderate their rates of increase in tuition, or dramatically increase the share of tuition revenues that they give back in the form of grant aid.

When a rankings scheme is based on a variety of self-reported variables, institutions have incentives to act to influence those variables so as to improve their rankings. I have written extensively about steps undergraduate institutions have taken to improve their *U.S. News* rankings—steps that may require increased spending but that have no positive effect on students’ experiences. Institutions also examine all the data they are going to submit to the magazine to see if there are legitimate things they can do that will make their data “look better.”<sup>44</sup> However, when institutions take actions to improve

42. However, state specific bar exams may dampen interstate mobility of lawyers.

43. Jerome Organ recently addressed the extent to which some law schools award merit scholarships to entering first-year students that are much more difficult to renew in subsequent years than the students believe. He discusses how this impacts law students and the culture of law schools. Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law Schools*, 61 J. Legal Educ. 173 (2011).

44. Ehrenberg, *Tuition Rising*, *supra* note 3, at 50-61. Ronald G. Ehrenberg, *Reaching for the Ring: How U.S. News & World Report Shapes the Competitive Environment in U.S. Higher Education*, 26 Rev. Higher Educ. 145 (2003), available at <http://theunbrokenwindow.com/>



their rankings that will mislead future applicants—such as allegations that some law schools give their graduates temporary jobs to inflate the reported employment probabilities—these institutions are coming close to violating ethical norms. And when they intentionally provide inaccurate data, as a number of law schools allegedly have done, they have definitely crossed the line.<sup>45</sup> Law schools should be synonymous with ethical behavior.

Because of obsessions with rankings and institutional prestige, many American higher education leaders appear to have stopped thinking about the important social role of higher education. Some leaders have kept their focus, however. Cornell's President David Skorton, for example, barely blinked when I showed him data suggesting that, while Cornell's undergraduate student body was getting better each year, it was improving at a slower rate than those of our competitors. Thus we were falling behind in student selectivity rankings and probably needed to figure out how to alter our financial aid policies to attract more top students. But when Skorton saw data in 2008 showing a decrease in the share of our students who received Pell Grants—the federal undergraduate grant program for students from lower- and lower middle-income families—he dramatically increased the generosity of our grant aid programs for lower income students. This while Cornell was suffering serious structural budget deficit problems.

The controversies relating to the misreporting of law school data to *U.S. News* should help to remind AALS members that obsession with the magazine's law school rankings is not in the social interest.

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Higher%20Ed/Readings/Brass%20Ring.pdf; Ronald G. Ehrenberg, Method or Madness? Inside the USNWR Rankings, 189 J. College Admissions 29 (2005).

45. Doug Lederman, Disingenuous Data, Inside Higher Ed, Nov. 9, 2011, available at <http://www.insidehighered.com/news/2011/11/09/iona-admits-ex-official-misreported-data-outside-entities>.